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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

)
Application by Ameritech Michigan)
Pursuant to Section 271 of the)
Telecommunications Act of 1996 to)
Provide In-Region, InterLATA)
Services in Michigan)

CC Docket No. 97-137

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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EXECUTIVE SUMMARY

Section 271 of the 1996 Act is a "show me" provision. Because Ameritech has not shown that the commercial arrangements Congress mandated are up and running, and because it has not shown that local competition has developed to the degree required to warrant relaxation of the line-of-business restriction of the 1996 Act, its application must be denied.

Only competition cabins the BOCs' ability to engage in the kinds of anti-competitive behavior that necessitated continuation of the line-of-business restriction. As Congress crafted § 271, it considered whether it should rely on regulatory predictions about local competition, or instead rely on empirical evidence that competitors and competitive markets had actually developed. It chose to demand proof of working commercial relationships and competition as the predicates for BOC in-region long-distance entry. The § 271 test is practical because Congress understood that it could not

predict with certainty either the course or the timing of the development of local competition. Congress did all that it could to promote local competition, but it understood that, in the end, competition could not be mandated by administrative fiat.

Congress' practical bent is reflected first in its decision to require the BOC to prove that at least one of its competitors is providing telephone services to business and residential customers predominantly over its own facilities. Ameritech cannot pass this threshold requirement. It offers Brooks Fiber as its only competitor meeting this test, but Ameritech does not claim that Brooks is providing services predominantly over its own facilities. It claims only that Brooks is not reselling Ameritech services, tacitly acknowledging that Brooks' service is provided predominantly through network elements leased from Ameritech, and still within Ameritech's control. Ameritech thus fails to clear the very first hurdle.

Congress' practical bent is also reflected in the judgment that all fourteen items on the competitive checklist had to be "provided" to operational competitors. It assured that "provided" was to be given its common-sense meaning by contrasting it with merely "making available" checklist items where no competitors emerged. And Congress reinforced this command by insisting that the BOC "fully implement" the requirement that it actually provide each of these checklist items. In reaching this judgment, Congress required that the BOC be actually "providing access" to a facilities-based competitor, and it rejected an alternative approach that would have only required that a BOC enter into an agreement allowing such access.

Ameritech fails this test as well. Indeed, it does not even pass its own less rigorous test based on contractual undertakings alone, a test Congress found inadequate. The Brooks agreement has no

provisions for three critical checklist items: unbundled transport, unbundled switching, and resale. Neither could Brooks “borrow” these items from other contracts, Ameritech’s statements to the contrary notwithstanding. Brooks’ contract does not allow for that. Critical paths of market entry are shut off to Brooks, since by contract it can offer neither resale service nor service through most combinations of unbundled network elements.

To be sure, Ameritech has entered into agreements with AT&T and Sprint that recite all checklist items. But it entered into those agreements so recently, and filed this application so hastily after it the agreements were approved by the Michigan Public Service Commission (“MPSC”), that (apart from AT&T’s resale service offerings) neither of these companies has yet had the chance to perform under their contracts. Ameritech asserts that the provisions of the “AT&T and Sprint agreements are not mere ‘paper promises.’” Br. 17. But that is exactly what they are. Ameritech’s submission in large part consists of a recitation of clauses of the AT&T and Sprint agreement that no one has ever put to any use. Section 271 requires more.

When one turns to the individual checklist items, time and time again Ameritech has little or nothing to show. In particular, Ameritech’s operations support systems are inadequate to support most checklist items. The public service commissions in Wisconsin, Illinois and Michigan all have held contested evidentiary hearings on Ameritech’s OSS, and all have reached the identical conclusion: Ameritech has not carried its burden of proving that its OSS works. If Ameritech cannot deliver checklist items to its carrier customers in commercially significant quantities, and if it cannot provide the necessary information to allow its competitors to bill and repair these items, it has not satisfied the checklist. In this as in everything else, Congress demanded performance, not promises.

Ameritech's evidence of performance is limited almost exclusively to the ordering of its resold services. And what the evidence shows is that Ameritech's ordering systems do not perform adequately even when handling small quantities of orders. Ameritech acknowledges its failure to provide unbundled local switching, a checklist item critical to MCI's entry strategy. As for the remaining checklist items, for the most part Ameritech offers no evidence at all of how its systems work in practice, because it has never put those systems into practice. Absent facts to evaluate, the Commission is asked instead to evaluate the opinions of Ameritech's system "experts," opinions that, as it happens, have been roundly criticized by Ameritech's state regulators. This is not what the statute requires.

Ameritech's prices interpose another insuperable barrier to local competition and fail to satisfy the requirements of the checklist. The prices are interim only, and the MPSC has acknowledged that they do not satisfy the FCC's pricing rules. Moreover, Ameritech (along with other BOCs) has successfully persuaded the Eighth Circuit to stay the pricing rules and has argued that the pricing standards imposed by the MPSC violate both the 1996 Act and the U.S. Constitution. Ameritech has filed this application just before Michigan is due to set permanent prices, and while its argument before the Eighth Circuit is sub judice. The prices competitors must pay in Michigan are up in the air.

And critical interim prices are sky high. In particular, prices imposed under the guise of one-time, non-recurring charges are so high that, if they remain in place, they represent an insuperable barrier to entry. Checklist items like switching and transport are not available at cost-based rates, and they are not available at rates that enable a competitor to compete. They are not really "available"

at all.

Congress also required the Commission to deny BOCs entry into their in-region long distance markets unless and until the BOC affirmatively demonstrates that its entry is “consistent with the public interest, convenience, and necessity.” § 271(d)(3)(C). Permitting Ameritech to enter the long distance market in Michigan at this point is not in the public interest because, as a result of the many barriers to entry that still remain, Ameritech retains monopoly control over local telephone service in Michigan. The limited competition that exists in Michigan is too embryonic to demonstrate that consumers in Michigan have or will have anything like the type of choice of local telephone providers that they have for long-distance providers. Therefore, the market cannot now discipline anti-competitive behavior by Ameritech in either the local or long distance market. Removing the structural separation imposed to avoid anti-competitive behavior in the long distance market before the local market can fulfill this disciplinary function is not in the public interest. Likewise, premature removal of the incentive provided to encourage BOC cooperation in opening the local market, especially while inflated access charges give the BOCs a huge and unfair advantage, is not in the public interest.

For all of these reasons, the Commission should deny Ameritech’s application.

INTRODUCTION

With competitors in only a tiny fraction of its local market, Ameritech declares that Michigan's consumers have now "achieve[d]" the benefit of the "culmination of more than four years of [Ameritech's] procompetitive efforts." Ameritech's Brief In Support of Application ("Br.") at 3. Ameritech says it has done all it can do, and asks this Commission to bless its efforts and reward it with in-region long distance authority.

If this is really the "culmination" of the process intended by Congress to result in vibrant local competition, then it should be frankly acknowledged that the Act has failed in Michigan. Congress intended consumers to have a choice of local carriers, and in Michigan today all but a handful of consumers have no choice. And make no mistake -- if the Commission sets the bar this low here, forty-nine more applications will quickly follow, trumpeting the same "culmination." On such a bleak hypothesis, the promise of the rapid development of local competition through the Act's incentives, and through the enforced cooperation of the BOCs with their potential competitors, will not have come to pass.

Ameritech offers no explanation why its "fully open" and lucrative local market apparently can sustain only one significant market participant -- Ameritech. The truth is that Ameritech continues to have a stranglehold on its local market because it continues to maintain insurmountable barriers to block its potential competitors. In place of commercial arrangements with its would-be competitors that are efficient, scalable and functional, Ameritech offers only predictions from discredited consultants that the few OSS systems it has up and running, and the many that it only claims only to have tested, will really work under the stress of active competition. In place of cost-

based prices are interim prices that Ameritech is seeking to increase dramatically. These prices include wildly inflated recurring and non-recurring charges that mask the true price of network elements and make profitable entry impossible. Other formidable barriers to entry are given the same back of the hand.

Allowing Ameritech into long distance at this time would eliminate its only incentive to cooperate just at the time when its cooperation is most needed. It would put at risk all of the work that has been done and remains to be done before the formidable barriers to local entry have been irreversibly eliminated. Equally in jeopardy is the competitive long-distance market, which today remains hostage to Ameritech's bottleneck control over access to the upstream local market.

This is the state of competition in Michigan today:

- Competing local exchange carriers ("CLECs") receive 0.3% of the access minutes that MCI terminates in Michigan each month (490,000/165,000,000 minutes).¹
- CLECs own or lease at most 1.2% of the access lines in Ameritech Michigan's region (67,000/5,550,000 access lines).²
- CLECs own 1.3% of the switches in Ameritech Michigan's region (6/448 switches).³

¹Terminating access statistics are for April 1997 and are derived from MCI internal data. See Affidavit of Kenneth Baseman & Frederick Warren-Boulton, MCI Ex. A ("Baseman & Warren-Boulton Aff.") ¶ 68 & n.51.

²See Affidavit of Robert Harris & David Teece, Ameritech vol. 3.3 ("Harris & Teece Aff."), at 28 (unbundled loops provided to CLECs); *id.* at 47 (CLEC "on-net" loops). The total number of access lines in Ameritech Michigan's region was derived by adding the number of Ameritech Michigan access lines (5,505,000) to the number of "on-net" loops owned by CLECs (45,000). See FCC, Statistics of Communications Common Carriers, table 2.10 (1995/1996 ed.) ("FCC Stats") (Ameritech Michigan access lines).

³See Harris & Teece Aff., at 47 (CLEC switches); FCC Stats, table 2.10 (Ameritech switches).

- CLECs share access to 0.04% of Ameritech's conduits and ducts (72,000/200,000,000 ft).⁴
- CLECs share access to 0.02% of Ameritech's poles (99/434,000 poles).⁵
- CLECs serve only about 1% of Michigan's local exchange customers.⁶
- CLECs have purchased less than 0.5% of Ameritech's loops (21,000/5,505,000).⁷
- The expected in-service capacity provided by the collocation facilities touted as available by July 1997 is only 6 % of Ameritech's total lines -- *if* all other elements and interconnections needed are available. Baseman/Warren-Boulton Aff. ¶ 78.

By any measure, this is a closed market.

It was closed local telephone markets of precisely this character that Congress intended to "shift to . . . competition"⁸ through the regulations and incentives of the 1996 Act.

Congress understood that such a sea change in the local market would require the cooperation of the incumbent monopolists, who have no natural incentive to cooperate with would-be competitors. And Congress understood as well that regulation alone could not enforce this cooperation. On that understanding, Congress gave the BOCs an incentive to cooperate -- when

⁴See Ameritech Brief at 41 (conduits and ducts accessed by CLECs); FCC Stats, table 2.10 (Ameritech's total conduits and ducts).

⁵See Brief at 41 (poles accessed by CLECs); FCC Stats, table 2.10 (Ameritech's total poles).

⁶Baseman/Warren-Boulton Aff. ¶ 68 and n. 52.

⁷See Harris & Teece Aff., at 28; FCC Stats, table 2.10 (Ameritech access lines).

⁸See H.R. Rep. No. 104-204 at 89 (1995) ("House Report"); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, at ¶ 3, CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996) (hereinafter "Local Competition Order"), pet. for review filed sub nom. Iowa Util. Board v. FCC, (8th Cir. Nos. 96-3221 and consolidated cases)

through their cooperative efforts the BOCs cede their monopoly control of the local markets, they will be allowed to compete in their in-region long distance markets.

Additionally, Congress preempted state laws that prohibit any competitor from offering local service (§ 253), and required incumbent local exchange carriers (“ILECs”) to allow potential competitors to use existing ILEC networks (§ 251). But Congress knew as well that the elimination of legal barriers to entry, even when coupled with an obligation to cooperate with would-be competitors, had not worked in the past to open the local market, and was not likely to work in the future. Before the remaining line-of-business restrictions could be eliminated, Congress therefore also required the BOCs to prove that their markets were open in practice, not just in theory.

In making this judgment, Congress also was fully aware of the dangers to the long-distance market that made the line-of-business restriction necessary in the first instance. Divestiture and the corollary line-of-business restriction were necessary to “limit[] the ability of businesses with bottleneck control of local telephone service to utilize their monopoly advantages to affect competition in competitive markets.” United States v. Western Elec. Co., 797 F.2d 1082, 1088 (D.C. Cir. 1986). In particular, divestiture was necessary because regulation that merely outlawed discrimination and then left it to the regulators to enforce the law did not work. United States v. AT&T, 552 F. Supp. 131, 167-168 (D.D.C. 1982) (“MFJ Opinion”), aff’d mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

Local competition can greatly reduce or eliminate the anticompetitive dangers that necessitated the line-of-business restriction. When customers have a choice of local telephone carrier, a local carrier that attempts to discriminate against a long distance carrier and drive up its costs risks

losing customers to a local carrier that does not engage in such anticompetitive conduct. Thus Congress hoped that the discipline of a competitive local marketplace might make the line-of-business restriction unnecessary. But hope alone exerts no market discipline at all. Only real changes in the local market can eliminate the harm that at present is averted by the line-of-business restriction. This application is premature because it is based in the end on Ameritech's predictions about the prospects for local competition in the future. Congress demanded more:

First, it demanded proof that a BOC was providing each of the fourteen checklist items and that it had fully implemented the checklist for business and residential subscribers.

Second, it demanded that the BOCs not only fully implement the checklist, but also prove that the local market had evolved sufficiently that meaningful facilities-based competition had emerged and BOC entry into long distance would be in the public interest.

Because neither of these demands is satisfied here, Ameritech's application must be denied.

I. AMERITECH HAS NOT SATISFIED THE THRESHOLD REQUIREMENTS OF SECTION 271.

Section 271 places the burden of proof squarely on Ameritech. The FCC must deny the application unless Ameritech has proven that all the conditions of § 271 are satisfied. The pivotal language of subsection (d)(3) -- "The Commission shall not approve the authorization requested . . . unless it finds . . ." -- directs the Commission to deny the application when it is unable to make the affirmative findings detailed in subparagraphs (d)(3)(A)-(C).⁹ We turn first to those statutory

⁹See generally, e.g., Gutierrez v. Sullivan, 953 F.2d 579, 584 (10th Cir. 1992), cert. denied, 509 U.S. 933 (1993) (under Equal Access to Justice Act, which provides that "a court shall award to a prevailing party . . . fees and other expenses . . . unless the court finds that the position of the United States was substantially justified," government has the burden of proving substantial

requirements, and then to the proof offered by Ameritech.

A. Ameritech Has Not Satisfied the Requirements of Track A.

The Act makes local competition the precondition to BOC in-region long-distance entry. Specifically, § 271(c)(1)(A), known as “Track A,” requires that the BOC enter into one or more approved agreements with a competing carrier that provides service to both residential and business customers; and that the competitor provide such service exclusively or predominantly over its own facilities.

The latter requirement has not been met here. According to Ameritech, Brooks is the only company with whom it has entered into an approved interconnection agreement that is providing facilities-based services to residential customers as required by § 271(c)(1)(A), while MFS and TCG are facilities-based providers to business customers.¹⁰

But Ameritech has not carried its burden of proving that Brooks’, MFS’ or TCG’s services are provided “predominantly over their own . . . facilities.” § 271(c)(1)(A). To the contrary, Ameritech does not deny that these carriers’ local facilities are in fact predominately owned by Ameritech, but insists that as a legal matter these interconnections satisfy the “[CLEC’s] own facilities” test so long as the local service offered is not predominantly through resale. On Ameritech’s view, even if Brooks operated exclusively through elements leased from Ameritech, and

justification); Jones v. Lujan, 887 F.2d 1096, 1097 (D.C. Cir. 1989) (same).

¹⁰Ameritech asserts that the MFS and TCG agreements give them the right to offer both residential and business service, but that MFS and TCG do not in fact currently provide residential service. Br. at 7. See Evaluation of U.S. Department of Justice, SBC Communications -- Oklahoma, May 16, 1997 (“DOJ SBC Evaluation”), at 20-21 (carrier not providing service under the Act to residential customers unless it is actually currently providing such service).

entirely under Ameritech's control, Brooks would still be operating over its "own facilities."

But the law in terms requires services predominantly through the CLEC's "own" facilities; it does not, as Ameritech would have it, simply exclude resellers from the statutory definition. And the Commission in its Local Competition Order repeatedly gave these words their common-sense meaning, distinguishing between a CLEC's "own" facilities, and those facilities it leases from a BOC.¹¹ In its comments on the proposed local interconnection order, Ameritech did the same.¹²

Strong policy considerations support this distinction. Track A requires operations of a competitor which is not forced to rely on the BOC for most of the facilities used to provide telephone exchange service. Otherwise, the BOC would retain the ability -- through its ownership -- to stymie interexchange and local competition by its control of the ordering, provisioning and repair of what are, after all the BOCs' own facilities. Additionally, when a competitor invests in its own distinct facilities it can offer unique functionality and services that provide consumers with real competitive choices. Finally, in this regard, competitors that make unrecoverable investments in local telephone networks are advancing permanent, long-term competition in a way that resellers or lessees of the BOC's existing network are not. Id. ¶ 43. For all of these reasons, Congress required as a threshold matter that a BOC seeking long-distance entry face competition from firms that provided service predominantly through their "own" facilities. Because Ameritech has not carried its burden of

¹¹See, e.g., Local Competition Order ¶ 334 (CLECs "can obtain access to unbundled elements without owning any of their own facilities"). See also, e.g. id. ¶¶ 232, 328, 330, 336, 339, 362.

¹²Ameritech Comments in CC Docket No. 96-98, at 26 ("competition is increased by enabling 'a new entrant . . . to rely on a combination of its own facilities and facilities leased from the incumbent LEC.'") (quoting order by MPSC, ellipses in original).

proving that it faces such competition, it fails to satisfy the threshold requirement of Track A.¹³

B. The Access And Interconnection Ameritech Provides To Alleged Facilities-Based Competitors Do Not Satisfy The Competitive Checklist.

Assuming, arguendo, that Brooks, MFS and TCG are predominantly facilities-based providers, Ameritech's application should still be denied because the access and interconnection it provides to these competitors does not "fully implement[]" the competitive checklist" as required by the Act. § 271(c)(2)(A)(ii); § 271(d)(3)(A)(i).

None of these carriers has any right under its own interconnection agreement with Ameritech to obtain unbundled switching. This is no minor omission: unbundled switching is a critical component of facilities-based entry into the local market. Affidavit of Nate Davis, MCI Ex. B ("Davis Aff.") ¶¶ 15, 37; Affidavit of Cari A. Sanborn, MCI Ex. G ("Sanborn Aff.") ¶¶ 46-50. Additionally, the Brooks contract contains neither substantive resale provisions nor provisions for unbundled transport. Affidavit of Theodore Edwards, Ameritech App. vol. 2.3, Sch. 2.

¹³These market-opening policies of § 271 serve to distinguish this proceeding from the Commission's Universal Service Order, where it ruled that a carrier that provides universal service over unbundled network elements leased from the BOC was providing such service over its "own facilities" for purposes of determining access charges. But in this regard the "facilities-based" requirements in universal service provisions serve entirely different purposes than the "facilities based provider" requirement of § 271. In the Universal Service Order, the Commission determined that the relevant distinction was between resellers, which pay a wholesale price derived from a non-cost-based retail price, and all other providers, which pay cost-based rates for network elements. It makes no sense to give BOCs universal service subsidies when they lease unbundled network elements in high-cost areas, since they already necessarily recover their costs; if anyone, the lessee needs the subsidy so it can charge a lower retail price without losing money. For purposes of § 271, in contrast, the critical issue is control, not cost: whether the BOC retains the ability to use its control over the local network to stymie local and long distance competition. Consequently, although it makes sense to interpret the phrase "own facilities" to include leased network elements in the universal service context, it does not in the § 271 context.

Much the same is true about many of the other items on the checklist. To prove compliance with the checklist, Ameritech turns to the bare terms of the Sprint and AT&T contracts. See Br. pp. 22 n.20, 23 n.23, 31 nn.28 & 29, 32 nn.30-33, 33 n.34, 34 n.35, 35 n.36, 37 n.39 38 n.40, 40 nn.41-44, 41 n.46 , 48 nn.55 & 56, 49 nn.58-60, 50 n.63. But Ameritech has filed this application so prematurely that these competitors are not yet (despite their plans) facilities-based providers, and so cannot be relied upon to show checklist compliance.

True, admits Ameritech, but it insists that “most favored nation” clauses in the Brooks, MFS and TCG agreements should be read as incorporating all of the provisions of the recently approved contracts with AT&T and Sprint, contracts which offer each of the checklist items. Br. at 16.

But the Brooks, TCG and MFS “most favored nations” clauses do not incorporate all provisions in the AT&T and Sprint agreements. Those clauses each state that “if either Party enters into an agreement . . . which provides for the provision of arrangements covered in this Agreement . . . such Party shall make available to the other Party such arrangements upon the same rates, terms and conditions as those provided in the Other Agreement.” Brooks Agreement ¶ 28.15(a); MFS Agreement ¶ 28.14; TCG Agreement ¶ 29.13.1. As the MPSC determined, “[g]eneral item-by-item adoption of provisions in another’s contract does not appear to be permitted by the terms of the Brooks . . . agreement[] as written.” Comments of the Michigan Public Service Commission in FCC Doc. 97-1 (Feb. 5, 1997) (“MPSC Comments”) at 10. Only checklist items “covered in th[e Brooks, TCG or MFS] Agreement” are incorporated by reference from other agreements. Since none of those agreements covers such arrangements as unbundled switching, and the Brooks agreement also does not cover resale or unbundled transport, neither the Sprint nor the AT&T agreements can be

used to supplement the checklist items missing from these agreements.¹⁴

In sum, neither the Brooks, MFS nor TCG agreement meets the requirements of the competitive checklist, and Ameritech's application, which depends entirely upon the claim that they do, must be rejected.

C. Ameritech's Interconnection and Unbundling With All Of Its Competitors Does Not Satisfy The Competitive Checklist.

Because the Brooks, MFS and TCG agreements facially fail to satisfy the competitive checklist and do not incorporate the terms of contracts that do contain all checklist items, this application should be rejected without any extended analysis of Ameritech's evidence about its involvement with local competitors generally. But this evidence too falls short because Ameritech has failed to fully implement the requirements of the competitive checklist.

1. Ameritech Misconstrues The Nature Of Its Obligation To Provide and Fully Implement Each Checklist Item.

Ameritech has not "provided" or "fully implemented" each of the checklist items. It acknowledges that several critical checklist items are not in commercial use, but insists this application need not wait upon market implementation. Instead, Ameritech contends that it is required only to "offer" or "make available" each of the checklist items and to prove to regulators

¹⁴ Ameritech does not and could not fairly rely on § 252(i) to incorporate other contract terms into the Brooks, MFS or TCG agreements. Under the Commission's regulations interpreting § 252(i), Ameritech would be required to allow these competitors to "pick and choose" among the AT&T and Sprint provisions to fill the gaps in their deficient agreements. But, Ameritech argued that the Eighth Circuit Court of Appeals should reject the Commission's § 252(i) rules. Petitioners' Reply Br., No. 96-3321 (8th Cir. 1997), at 47-49 (arguing CLECs had to take all or nothing from other CLEC agreements). The Eighth Circuit then stayed these rules. Iowa Utilities Board v. FCC, 109 F.3d 418, 420 & n.4 (8th Cir. 1997). And Ameritech even persuaded the MPSC not to endorse the FCC's interpretation. See MPSC Comments at 9-10.

that it could deliver the offered item if asked. Br. at 19.

But as we indicated at the outset, in mandating “full implementation” of the requirement that the items on the competitive checklist be “provided,” Congress eschewed reliance on regulatory judgments about what kinds of competitive arrangements might or might not work in practice if they were ever put to the test. Instead, Congress decided to trust the market itself, requiring actual competition through the mechanisms specified in a “competitive checklist” as a prerequisite to in-region long distance entry:

The requirement that the BOC is “providing access and interconnection” means that the competitor has implemented the interconnection request and the competitor is operational. This requirement is important because it will assist . . . in the explicit factual determination by the Commission under new section 271(d)(2)(B) that the requesting BOC has fully implemented the interconnection agreement elements set out in the “checklist” under new section 271(c)(2). [H.R. Rep. No. 104-458, 104th Cong., 2d Sess., at 148 (1996) (emphasis supplied)].

In short, and as we explain in more detail in what follows, this is a “show me” statute.

Because in critical respects Ameritech has nothing to show, it proposes an interpretation of § 271 that requires regulators to make precisely the kinds of predictive judgments that Congress determined to avoid.

Ameritech insists that “full implementation” requires only a contractual commitment coupled with internal testing of the contract offering. For example, it claims that in 1997 it entered into contracts agreeing to provide unbundled elements, and claims that it internally tested the OSS systems supporting these offerings. But it was only in April of this year that it finally published a manual explaining to its competitors how they could develop systems enabling them to order, provision, repair and bill for these offerings, and still today it has not published the material necessary to “map”

the unbundled network element OSS. See King Aff. ¶¶ 37, 38, 133. Less than one month later, before any competitor could possibly have implemented these items, Ameritech filed this application, insisting that its systems will work, and that it has done all it need do. But the dictionary defines “implement” as “to give practical effect to and ensure of actual fulfillment by concrete measures.” Webster’s Seventh New College Dictionary. By this or any other reasonable definition of the statutory text, Ameritech has not “fully implemented” the unbundling of its network elements.

Neither has Ameritech “provided” each checklist item. Every time the statute uses the term “provided,” it does so in direct contrast to the phrase “generally offered.” Compare 271(c)(1)(A) with 271(c)(1)(B); 271(c)(2)(A)(i)(I) with 271(c)(2)(A)(i)(II); 271(d)(3)(A)(i) with 271(d)(3)(A)(ii). “Providing” access that includes the checklist items must therefore mean something more than merely “offering” the checklist items.¹⁵

Ameritech’s argument to the contrary erases the critical statutory distinction between Track A and Track B. Track A is the normal path of entry requiring the BOCs to “fully implement” the requirement that checklist items be “provided,” while Track B is the “limited exception to the Track A requirement of operational competition” requiring only that the items be “offered.” DOJ SBC Evaluation at 11.¹⁶ Ameritech’s assertion that “providing” means no more than “offering” guts this

¹⁵ E.g., Webster’s Third New Int’l Dictionary 1827 (1986) (“provide and supply are often interchangeable.”); 12 Oxford English Dictionary 713 (2d ed. 1989) (defining “provide” as “[t]o furnish or supply (a person, etc.) with something”).

¹⁶ Track B was added to the statute to protect against the possibility that long-distance companies would orchestrate a boycott so that there would be no competitors “request[ing] the access and interconnection described in [Track A],” § 271(c)(1)(B), thereby preventing the BOCs from entering the long distance market.

distinction, which is fundamental to the statute: “Track B does not represent congressional abandonment of the fundamental principle, carefully set forth in Track A, that a BOC may not begin providing in-region interLATA services before there are operational facilities-based competitors in the local exchange market, if there are firms moving toward that goal in a timely fashion.” DOJ SBC Evaluation at 17-18. The exceptional requirements of Track B, in sum, provide the strongest possible reason for rejecting Ameritech’s understanding of Track A.¹⁷

Ameritech complains that it is theoretically possible that no competitor will request a particular checklist item. On that hypothesis, Ameritech insists, it could be unfairly kept out of long distance through no fault of its own if it were forced to comply with Track A. Br. 19. On the strength of this hypothetical, Ameritech argues that the Commission should rewrite the Act and the meaning of “provide” and “fully implement.”

But Ameritech’s hypothetical concern is unfounded. MCI, for one, has requested all checklist items from Ameritech, and MCI fully intends to make use of each of those items. See Sanborn Aff. at Ex. 1. Other would-be competitors, including AT&T, have requested all of them as well.

¹⁷In support of its misreading of the statute, Ameritech points to a snippet from the Conference Report. See Br. at 20, citing Conf. Rep. at 144. But the section of the Conference Report upon which it relies is titled “Senate bill” and is a description of that bill. And, as that same Conference Report later explains, the Senate Bill’s approach was ultimately rejected by the Conference on just this point. See id. at 147 (“This test that the conference agreement adopts comes virtually verbatim from the House amendment”) (emphasis supplied). The Senate Bill did not have a Track A and Track B, did not require the “presence of a facilities-based competitor,” and did not require that access and interconnection implementing the checklist be “provided.” Instead, it required the BOCs only to “reach[] an interconnection agreement under section 251 . . . that . . . provides, at a minimum, for interconnection that meets the competitive checklist.” S. 652, § 255(b)(1). The Conference rejected this approach, and in so doing stressed that an “important” feature of the contrary approach it adopted was the requirement that “the competitor [be] operational.” Conf. Rep. at 148.

In any event, it was Congress' judgment that the FCC must wait until it sees full implementation of the competitive checklist with operational competitors, and must not substitute for such proof its own suppositions about whether a BOC could implement its contractual undertakings. Congress understood that many of the processes and technology for interconnection and unbundling are new and complex and will require significant cooperative effort to implement. For example, many untried operations support systems ("OSS") interfaces need to be operational on a commercial scale before a competitor can offer timely and reliable retail services to customers. See Affidavit of Samuel L. King, MCI Ex. D ("King Aff.") ¶¶ 25-30. These new interconnection and unbundling agreements are not like contracts to deliver well-known and understood goods and services, where through a course of dealings or historical usage all of the parties know what a contractually specified item is, how it works, and what kinds of performance can reasonably be expected. King Aff. ¶ 9. It is inevitable that problems and disputes will arise in translating the agreements' paper commitments into actual performance.

The BOCs have acknowledged as much:

You can do all the testing you want, but the theoretical world does not always translate one-for-one into the real world. Many difficult problems are encountered that simply cannot be accounted for readily ahead of time.[Testimony of Jerald Sinn, PacBell's Customer Service Vice President in MCI v. PAC Bell, Case No. 96-12-026 (Cal. Pub. Util. Com'n, May 2, 1997, at 3)]

Congress legislated a very practical solution to this problem. Rather than requiring BOCs only to reach interconnection agreements to open up their monopoly markets, as the Senate originally had proposed, See n. 17, supra, Congress decided to require, as a threshold matter, proof that the specified contractual arrangements actually worked as advertised. Rather than requiring the FCC to

evaluate BOC claims that they had sufficiently tested their systems, Congress instead required the FCC to assure itself “that the competitor has implemented the agreement and the competitor is operational.” H.R. Rep. No. 104-458, at 148. And Congress stressed that “[t]his requirement is important” because it would result in real competitive practices that would allow the Commission to make “explicit factual determination[s]” about compliance with the checklist and the state of competition. *Id.*

Congress, in sum, chose to take the guesswork out of the § 271 process. As the Department of Justice put the matter:

Actual local entry with successful commercial usage of the BOC’s wholesale support systems . . . permits the formulation of performance benchmarks that will enable regulators and competitors to detect and constrain potential BOC backsliding and competitive misconduct after long distance entry. [DOJ SBC Evaluation at vii]

Ameritech concludes that because this requirement fails to take account of the possibility that no CLEC will request a particular checklist item, it “def[ies] common sense.” Br. at 18. But these are legislative judgments located in the text of the statute. They cannot be ignored simply because a regulated monopolist claims them unsound.

All that aside, Ameritech’s interpretation would create an open invitation to anticompetitive gaming. Under Ameritech’s interpretation, as soon as a BOC has completed internal testing and the state commission approves a contract making all checklist items “available,” it may file its application quickly before any competitor has “commit[ted] to purchase an item by a date certain,” Br. 16, and is entitled to long-distance entry without actually having to furnish the item. Some period of time will necessarily elapse after the state commission’s approval of an interconnection agreement and before a competitor’s commercial use of the agreement. Indeed, Ameritech has taken steps to prolong this

interregnum: it will not allow CLECs even to test ordering, provisioning and operation of critical untariffed checklist items without an approved agreement. Sanborn Aff. ¶ 58 & Ex. 2. Thus, Ameritech's theory creates a powerful incentive to file for in-region authority immediately after an agreement is approved, and before any competitor has had the opportunity to see whether the BOC can really deliver a checklist item.

The instant application attempts to game the system in just this sense. As Ameritech acknowledges, Br. at 36, it has never unbundled switching as required by the checklist, and it has not yet put into use critical OSS functions. It is therefore forced to rely, respectively, on the paper promises found in the AT&T and Sprint contracts, which purport to make unbundled switching "available," and internal testing of its OSS, both bolstered by the predictive (and predictably slanted) judgments of its consultants.

But Ameritech has withheld until last month any details of how it proposed to unbundle its switching and provide switching OSS to its competitors, and then only provided a sketchy outline. Both AT&T and MCI immediately asked to meet with Ameritech to start the process of understanding what Ameritech proposed, as a preliminary to developing the OSS capabilities to order unbundled switching. Sanborn Aff. ¶¶ 59-60. Having successfully prevented its competitors from being in a position "to commit to purchasing [unbundled switching] by a date certain," Br. 16, Ameritech completes the circuit, filing its application now before such a commitment possibly could be made, and asserting that it is therefore excused from the obligation to show that the advertised item actually works. Unbundled switching is not a checklist item "that no carrier will choose to buy," and MCI for one most emphatically has not "concluded that [it] does not need the item to compete

successfully in the local market.” Br. 18. To the contrary, MCI views it as a critical element of any entry strategy based upon unbundled network elements. Sanborn Aff. ¶¶ 46-50. Ameritech’s gamesmanship should not excuse it from meeting the plain requirements of the statute.¹⁸

B. Ameritech has not proved that each of the checklist items is
in commercial use.

Before turning to consideration of discrete checklist items, we discuss two deficiencies that infect virtually every aspect of Ameritech’s asserted compliance with the checklist: those relating to OSS and pricing.

i. **OSS Deficiencies.** Many checklist items are not “fully implemented” because Ameritech’s OSS interfaces and associated business processes needed to deliver and service the items are not adequate and operational. They fail to provide unbundled network elements and resale in timely, reliable, and nondiscriminatory fashion, and are unable to accommodate anticipated demand. “[P]roviding nondiscriminatory access to these support system functions . . . is vital to creating opportunities for meaningful competition.” Local Competition Order ¶ 518. “The checklist

¹⁸ The Department of Justice concluded that if the BOC has given adequate assurance that it could promptly and efficiently provide a checklist item, and the only reason a checklist item is not in use is that no potential competitor has asked for it, it makes little policy sense to find that the BOC has not “provided” the item. DOJ SBC Evaluation at 22-24. But a hypothetical contrary to the facts should not undermine a clear statutory directive. It makes no sense to frame a rule of general application on such an exceptional case. In any event, it is undisputed here that no facilities-based competitor has been “provided” access to unbundled switching under any definition, since neither Brooks, MFS or TCG have “approved agreements that set forth complete prices and other terms and conditions for [this] checklist item,” DOJ SBC Evaluation at 23, whereas at least two potential competitors -- AT&T and MCI -- are “actively requesting” this item. Id. Moreover, MCI is “experiencing difficulty obtaining that item,” id., because Ameritech has delayed the approval of its interconnection agreement with MCI, and Ameritech has taken the position that it will not provide -- or even test or discuss -- checklist items absent such an approved agreement. See Sanborn Aff. ¶ 58 & Ex. 2.

requirements of providing resale services and access to unbundled elements would be hollow indeed if the efficiency of -- or deficiencies in -- these 'wholesale support processes,' rather than the dictates of the marketplace, determined the number or quality of such items available to competing carriers." DOJ SBC Evaluation at 26. Ameritech's deficient OSS fail to satisfy the requirements of the checklist. See Local Competition Order, ¶¶ 517, 523, 525.

Ameritech uses the same OSS interfaces in all of its states. And, as it is forced to acknowledge, Br. 26-27, n.24, the State Commission in Wisconsin and the Hearing Examiner of the Illinois Commerce Commission both recently concluded after a full evidentiary hearing that Ameritech's OSS fell well short of what was required to satisfy the checklist. And, on May 28, 1997, the MPSC itself held a full evidentiary hearing on OSS issues, and joined its sister public service commissions in refusing to endorse Ameritech's OSS. Consultation of the Michigan Public Service Commission, CC Docket No. 97-137 (June 9, 1997) ("MPSC June 9 Comments"), at 26-38.

In particular, the Illinois Hearing Examiner concluded that "it is simply too early for us to determine whether the OSS will operate properly. We are not convinced that the internal testing performed by Ameritech can solve all of the problems that will arise."¹⁹ The Hearing Officer expressed particular concern about Ameritech's repair and maintenance interfaces, id., loop provisioning interfaces, id. at 34, and unbundled local switching interfaces, id. at 41.

The Wisconsin Commission reached the identical conclusion. It ruled Ameritech's OSS

¹⁹Proposed Order of Hearing Examiner in the Illinois Commerce Commission's Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271(c) of the Telecommunications Act of 1996, Docket No. 96-0404 (March 6, 1997) ("ICC Proposed Order"), at 28.

unacceptable in the following respects:

- * Too many manual transactions;
- * Order confirmations not adequately processed;
- * Too many orders rejected for improper reasons;
- * New CLEC customers double-billed;
- * Too much manual intervention in processing loops orders;
- * Inadequate evidence that maintenance and repair interface works;
- * Inadequate evidence that billing system interface works;
- * Systems are not “stable, predictable, or reliable.

Public Service Commission of Wisconsin Open Meeting, Utility Regulation Report, at 5 (April 3, 1997).

Ameritech asserts that it has “since addressed and resolved all of the alleged problems” identified by those Commissions. Br. at 26, n.24. It relies heavily upon a study it solicited from Andersen Consulting. But over the last several weeks the Illinois Commission reviewed these same claims. Those hearings revealed that little has changed, and that the Andersen study is not reliable.

The Illinois staff was particularly scathing about the Andersen study:

The independence of the review is suspect, since the scope and performance of the audit team’s work was heavily influenced by the auditee.

The auditors failed to review [Ameritech’s] testing problem log, resale bugs not fixed log, or issues general log. The consulting team did not ask Ameritech if they had any system by which they tracked problems they were experiencing with their OSS.

No member of the audit team attempted to contact any CLEC using Ameritech’s OSS to determine what their experience with the systems had been.

The audit team relied largely on the internal testing done by Ameritech.